

Order Instituting Rulemaking to Establish Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way

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ORDER INSTITUTING RULEMAKING

I. INTRODUCTION

In 1978, the U.S. Congress enacted Public Law 95-234, which directed the Federal Communications Commission ("FCC") to regulate the rates, terms and conditions of cable television system attachments to utility owned poles, ducts, conduits, and rights-of-way. 47 U.S.C. § 224. Although this statute was not intended to preempt state regulation in this area, 47 U.S.C. § 224(c), it still required the FCC to promulgate implementing regulations that would apply in the absence of effective state regulation, 47 U.S.C. § 224(b). Later in 1978, the Massachusetts General Court similarly authorized the Department of Telecommunications and Energy ("Department") (then the Department of Public Utilities) to regulate pole attachments. G.L. c. 166, § 25A, as amended by St. 1997, c. 164, §§ 265, 266. The Department subsequently promulgated rules for rates, terms and conditions for cable television attachments codified at 220 C.M.R. § 45.00 et seq.

In the Telecommunications Act of 1996, Congress sought to allow and enable competition in local telephone and cable television markets by expanding the applicability of 47 U.S.C. § 224 to require utility companies, including local exchange carriers, to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). As a result, the FCC amended its pole attachment regulations to provide "complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable." 47 C.F.R. § 1.1401. These regulations grant jurisdiction to the FCC unless a state has certified that it has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments. <sup>(1)</sup> 47 C.F.R. § 1.1414.

In a recent proceeding, the Department issued an Interlocutory Order limiting the scope of its investigation of a complaint filed by certain cable television providers against Boston Edison Company ("BEC"), to issues of whether the pole attachment rates, terms

and conditions that BECo charged the Complainants were just and reasonable. The Department also determined that it had not yet taken the prerequisite steps to invoke jurisdiction over claims of discriminatory access. Cablevision of Boston Company, et al v. BECo, D.P.U./D.T.E. 97-82, Order on Scope of the Proceeding at 7 (Feb. 11, 1998), *mot. for recons. and clarification denied*, Cablevision of Boston Company, et al v. BECo, D.P.U./D.T.E. 97-82, Interlocutory Order on Complainant's Motion for Reconsideration and Clarification of Department's Order on Scope of Proceeding (Mar. 5, 1998). The Department now seeks comments on proposed revisions to 220 C.M.R. § 45.00 et seq. that will ensure Department jurisdiction over future discriminatory access claims.

## II. PROPOSED REVISION TO REGULATIONS

This Order begins a rulemaking on complaint and enforcement procedures to promote non-discriminatory access by telecommunications carriers and cable system operators to utility poles, ducts, conduits, and rights-of-way. The Department proposes several revisions to the current version of 220 C.M.R. § 45.00 et seq. in order to align our regulatory authority more closely with the requirements of Federal laws and to carry out the terms of G.L. c. 166, § 25A. Several significant additions to the rules are: (1) A utility would provide a licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by the utility (§ 45.03(1)); (2) a utility would charge any affiliate, subsidiary, or associate company engaged in the provision of telecommunications services or cable services an amount equal to the pole attachment rate for which another company providing such services would be liable under this section (§ 45.10); and (3) the Department would order a refund or, if appropriate in a particular case, a payment (§ 45.07(3)). Other sections of the regulations have been revised, as needed, to track changes in statutory language. See, e.g., § 45.07 (addition of "just and" before reasonable pursuant to statutory changes resulting from St. 1997, c. 164, §§ 265, 266).

A copy of the current regulations indicating the proposed revisions is attached.

## III. SOLICITATION OF COMMENTS

The Department seeks written comments on these proposed revisions to 220 C.M.R. § 45.00 et seq. no later than 5:00 p.m. Thursday, January 21, 1999. In addition, all written comments shall be limited in length to a maximum of 20 one-sided, double-spaced type-written pages. All written comments should be filed with Mary L. Cottrell, Secretary, Department of Telecommunications and Energy, 100 Cambridge Street, 12th Floor, Boston, Massachusetts 02202.

To provide further opportunity for comment, and pursuant to G.L. c. 30A, §§ 2 and 4, and 220 C.M.R. § 2.05, the Department will hold a public hearing on Friday, January 29, 1999, at 10:00 a.m., at the Department's offices, 100 Cambridge Street, 12th Floor, Boston, Massachusetts, 02202.

By Order of the Department,

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Janet Gail Besser, Chair

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

220 CMR 45.00: RATES, TERMS AND CONDITIONS FOR CABLE TELEVISION ATTACHMENTS POLE ATTACHMENT COMPLAINT AND ENFORCEMENT PROCEDURES

Section

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45.01: Purpose and Applicability

220 CMR 45.00 provides for complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-ways on rates, terms and conditions for cable television attachments are that are just and reasonable. The general procedural rules set

forth at 220 CMR 1.00 are also applicable to proceedings initiated under this part except to the extent that they are inconsistent with 220 CMR 45.00.

#### 45.02: Definitions

As used in 220 CMR 45.00, except as otherwise required by the context,

Attachment means any wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities.

Complainant means a licensee or a utility who files a complaint.

Complaint means a filing by either a licensee or a utility alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this regulation and/or a rate, term or condition for an attachment is not just and reasonable. A complaint shall constitute an initial pleading within the meaning of 220 CMR 1.04(1).

Department means the Department of ~~Public Utilities~~ Telecommunications and Energy.

Licensee means any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways.

Respondent means a licensee or a utility against whom a complaint has been filed.

Usable Space means the total space which would be available for attachments, without regard to attachments previously made,

(a) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code, or

(b) within any telegraph or telephone duct or conduit.

Utility means any person, firm, corporation or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits or rights-of-way used or useful, in whole or in part, for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat or power.

45.03: Duty to Provide Access; Modifications; Notice of Removal, Increase or Modification; and Petition for Interim Relief

(1) A utility shall provide a licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a licensee access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(2) Requests for access to a utility's poles, ducts, conduits, or rights-of-way by a licensee must be in writing. If access is not granted in 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and

shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(~~1~~ 3) A utility shall provide a licensee no less than 60 days' written ~~prior~~ notice ~~for~~ prior to:

(a) removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the licensee's an attachment agreement, or

(b) any increase in attachment rates;

(c) any modification of facilities other than routine maintenance or modification in response to emergencies. ~~Nothing contained herein, however, shall in any way limit the right of a utility to respond to an emergency,~~ or to a request from a governmental authority without giving such notice to a licensee.

(~~2~~ 4) In conjunction with the complaint procedure outlined herein, a licensee may file with the Department a "Petition for Interim Relief" of the action proposed in a notice received pursuant to 220 CMR 45.03(1) within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of the licensee's service, a copy of the notice, and certification of service as required by the Department's Procedural Rules. The named respondent may file an answer within seven days of the date on which the Petition for Interim Relief was filed. No further filings with respect to this petition will be considered unless requested or authorized by the Department and no extensions of time will be granted with respect to this petition unless allowed pursuant to 220 CMR 1.02(5).

#### 45.04: Complaint

(1) A complaint will commence a proceeding under 220 CMR 45.00. Complainants may join together to file a joint complaint.

(2) Every complaint shall conform to the requirements specified in 220 CMR 1.04(1)(b) and shall be accompanied by certification of service on any utility, licensee, or party named as complainant or respondent. The complaint shall also contain the following:

(a) a copy of the attachment agreement, if any, between the licensee and the utility. If no attachment agreement exists, the petition shall contain:

1. a statement that the utility uses or controls, in whole or in part, those poles, ducts, ~~or~~ conduits, or rights-of-way at issue which are used or designated for attachments;

2. a statement that the licensee currently has attachments on such poles, ducts,

~~or~~ conduits, or rights-of-way or has requested from the utility that such attachments be placed;

(b) the specific attachment rate, term or condition which is claimed to be unjust or unreasonable;

(c) in any case where it is claimed that a term or condition is unjust or unreasonable, the complaint shall specify all information and argument relied upon to justify said claim;

(d) in any case where it is claimed that a rate is unjust or unreasonable, or that a term or condition requires review of the associated rate, the data, information and argument in support of said claim shall include, but not be limited to, the following, where applicable:

1. the gross investment by the utility for the pole lines;

2. the investment by the utility in appurtenances not used by or useful to the licensee. This may be expressed as a percentage of the gross pole investment, and shall include a list of specific appurtenances considered not used or useful;

3. the depreciation reserve for the gross pole line investment;

4. the total number of poles (A) owned; and (B) controlled or used by the utility;

5. the total number of poles which are the subject of the complaint;

6. the annual carrying charges attributable to the cost of owning a pole, and the specific factors used in the determination of these charges. Annual carrying charges may be expressed as a percentage of net pole investment;

7. the average amount of useable space per pole for those poles used for pole attachments;

8. reimbursements received from the licensee for non-recurring costs.

Data and information should be based on historical or original cost methodology, to the extent possible. Data should be derived from Form M, FERC 1, or other reports filed with



state or regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any rate determined by using the formula specified above;

(e) In addition to meeting the other requirements of this section, in any case where it is claimed that a licensee has been improperly denied access to a pole, duct, conduit, right-of-way, the complaint shall include the data and information necessary to support the claim, including:

1. The reasons given for the denial of access to the utility's poles, ducts, conduits, and rights-of-way;

2. The basis for the complainant's claim that the denial of access is improper;

3. The remedy sought by the complainant;

4. A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and

5. A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case;

(e f) a statement that the utility and licensee have been unable to agree and a brief summary, including dates, of all steps taken to resolve the problem prior to filing; If no such steps were taken, the complainant shall state the reason(s) why;

(f g) any other information and arguments relied upon to attempt to establish that a rate, term or condition is not reasonable; and

(g h) a statement that the complainant requests that a hearing be convened pursuant to 220 CMR 1.06 or that it waives its right to a formal hearing.

(3) Where the attachments involve ducts or conduits, appropriate and equivalent data and information shall be filed.

(4) All factual allegations set forth in the complaint shall be supported by affidavit(s).

45.05: Response

(1) The response to a complaint under 220 CMR 45.00 shall be filed within 14 days after service of the document to which the response is directed.

(2) The response shall specifically address all contentions made by the complainant. All factual statements shall be supported by affidavit(s). Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.

(3) The response shall include a statement that the respondent requests that a hearing be convened pursuant to 220 CMR 1.06 or that it waives its right to a formal hearing.

#### 45.06: Procedures Where Formal Hearing is Waived

(1) Applicability. The procedures set forth in 220 CMR 45.06 apply only if no party requests and is granted a hearing. If a full hearing is to be convened, the procedures contained in 220 CMR 1.06 et seq. shall apply.

(2) Notice. The Department shall give public notice by newspaper publication or by such other means as it deems advisable that a complaint has been filed and docketed. Such notice shall include a brief description of the complaint and shall set a time limit for filing of petitions to intervene. That time limit shall be no shorter than 14 days after such public notice.

(3) Intervention. The procedures outlined in 220 CMR 1.03 shall generally apply to petitions to intervene under this part. If a person is allowed by the Department to intervene, the Order shall be in writing and shall inform the intervenor of its right to a hearing, its responsibility to request a hearing within seven days after service of the Order, and that failure to make such a request will constitute a waiver of that right. If a hearing is requested and granted, the procedures set forth in 220 CMR 1.06 et seq. shall apply.

(4) Reply and Comments. The complainant shall have 20 days from the date the response is served to file a reply. Any person permitted to intervene as a party shall have the opportunity to file comments with the Department not later than 20 days after issuance of the Order permitting intervention. Any such comments shall be served on all parties and the parties may file a reply to the comments within 20 days after service. Unless authorized by the Department, no further filings shall be considered.

(5) Meetings and Evidentiary Proceedings. The Department may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary proceedings upon any issues.

(6) Department Consideration of Complaint. In its consideration of the complaint, response, reply, and comments the Department may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that may have been conducted. The Department may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Department, or where costs, values or amounts are disputed, the Department may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

#### 45.07: Remedies

If the Department determines that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may:

(1) terminate the unjust and unreasonable rate, term or condition; and

(2) substitute in the attachment agreement the just and reasonable rate, term or condition established by the Department; and

(3) order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Department from the date that the complaint, as acceptable, was filed, plus interest.

#### 45.08: Time Limit

The Department shall issue a final Order on the complaint filed in accordance with 220 CMR 45.00 within 180 days after the complaint is filed.

#### 45.09: Appeal from Department Decisions

The Department shall notify all parties of their rights to appeal a final decision of the Department pursuant to M.G.L. c. 25, s. 5, and of the time limits on their rights to appeal.

#### 45.10: Prohibition of Discriminatory Rates Charged Any Affiliate, Subsidiary, or Associate Company

A utility that engages in the provision of telecommunications services or cable services shall charge any affiliate, subsidiary, or associate company engaged in the provision of such services an amount equal to the pole attachment rate for which another such company would be liable under this section.

#### REGULATORY AUTHORITY

220 CMR 45.00: M.G.L. c. 159A: M.G.L. c. 166 § 25A.

1. The Federal Communications Commission has determined that Massachusetts has taken the appropriate steps to invoke jurisdiction concerning the rates, terms and conditions of pole attachments. 7 FCC Rcd 1498 (Feb. 21, 1992).